No. 15609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD ALLEN BLACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from the denial of a Motion to Correct Illegal Sentence, filed by appellant under the provisions of Section 2255 of Title 28, United States Code.

The District Court had original jurisdiction based upon Section 3231 of Title 18, United States Code.

It appears that the appeal from denial of said Motion was not filed timely in that the Memorandum Opinion denying the Motion is dated January 30, 1957, and was filed January 31, 1957; appellant did not file his notice of appeal therefrom until February 26, 1957. Section 2255 provides in part: ". . . An appeal may be taken

to the Court of Appeals from the order entered on the Motion as from a final judgment on application for writ of habeas corpus . . ." Appeal from a final judgment must be filed within 10 days after entry of judgment, Rule 37(a)(2), and no enlargement is permitted, Rule 45(b). Accordingly, since the instant appeal was not filed on or before February 10, 1957, it appears to have been filed too late to give this court jurisdiction under the provisions of Section 2255 or at all.

Upon the possibility that although this court will find no jurisdiction it may desire a convenient reference to the settled law contrary to the contentions of appellant, or that this court may determine that it does have jurisdiction to entertain the appeal, the Government files this Brief in response to the Opening Brief of appellant.

Appellee requests the indulgence of the court in that appellee has never been served with a copy of the record on appeal and is unable to refer specifically to any portion of the record.

II.
STATEMENT OF THE CASE.

Appellant was indicted together with three other persons on May 2, 1956, in the Southern District of California, Central Division. The indictment was in four counts. Appellant was charged in counts three and four only. Count three charges appellant with commission of a substantive offense, the sale of a narcotic drug, and count four charges him and others with a conspiracy to receive, conceal, sell and transport heroin.

On July 26, 1956, the jury found appellant guilty of the offense charged in counts three and four. The court, on August 13, 1956, committed appellant to the custody of the Attorney General for two years and imposed a fine in the sum of $1.00 on count three, and on count four, committed appellant for four years and imposed a fine in the sum of $1.00. With respect to the four-year term of imprisonment on count four, said period of imprisonment was ordered to run consecutively to the two-year period imposed on count three, "so that the total period of imprisonment shall be six years."

The Motion of appellant dated January 18, 1957, to correct illegal sentence, was denied by the Honorable Ben Harrison on January 30, 1957, without formal notice being served upon the United States Attorney and without hearing thereon, which is in accordance with the authority contained in Section 2255, Title 28, United States Code, where "the files and records of the case conclusively show that the prisoner is entitled to no relief, . . .".

On January 31, 1957, said Memorandum Opinion was filed.

The appeal was filed on February 26, 1957.

III-A.
STATUTES INVOLVED.

Appellant was indicted, in count three, for a violation of United States Code, Title 21, Section 174, which provides in pertinent part as follows:

> "Whoever fraudulently or knowingly . . . sells, or in any manner facilitates the sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law . . ."

shall be guilty of an offense.

Appellant was also indicted, in count four, for a violation of United States Code, Title 18, Section 371, which provides in pertinent part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . ."

guilty of an offense.

III-B.
COUNTS INVOLVED.

In his Opening Brief appellant has inadvertently erroneously deleted and altered portions of counts three and four of the indictment. These counts are correctly stated as follows:

> COUNT THREE: "On or about April 15, 1956, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Alfred Avery Reeves, Warren Lonnel Harris, and Richard Allen Black, after importation,

did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely, approximately 1 ounce, 69 grains of heroin, to Ralph M. Frias, which said heroin, as the defendants then and there well knew, had been imported into the United States contrary to law.

COUNT FOUR: "Beginning on or about April 15, 1956, and continuing to the date of the return of this indictment, defendants Alfred Avery Reeves, Warren Lonnel Harris, and Richard Allen Black did agree, confederate, and conspire together and with other co-conspirators unknown to the grand jury to commit offenses against the United States, as follows: to knowingly and unlawfully receive, conceal, sell, and transport and facilitate the concealment, sale, and transportation of, a certain narcotic drug, namely, heroin, and knowingly assist in so doing, which said heroin had theretofore been unlawfully imported into the United States as the defendants then and there well knew:

"To effect the objects of said conspiracy the defendants and other co-conspirators unknown to the grand jury committed divers overt acts in the Central Division of the Southern District of California among which were the following:

"(1) On or about April 15, 1956, defendant Alfred Avery Reeves had a conversation with one Ralph M. Frias in Bard's Parking Lot at Adams Boulevard and Victoria Avenue, Los Angeles, California;

"(2) On or about April 15, 1956, defendants Richard Allen Black and Alfred Avery Reeves engaged in a conversation at Mitchell's Delicatessen at Buckingham Road and Adams Boulevard, Los Angeles, California;

"(3) On or about April 15, 1956, at Los Angeles, Calfornia, defendant Richard Allen Black engaged in a telephone conversation with Ralph M. Frias;

"(4) On or about April 15, 1956, Ralph M. Frias delivered to defendant Alfred Avery Reeves the sum of $600.00 at Bard's Parking Lot, Adams Boulevard and Victoria Avenue, Los Angeles, California; and

"(5) On or about April 15, 1956, in Los Angeles, California, defendant Warren Lonnel Harris had in his possession the sum of $550.00."

IV.
ARGUMENT.

Appellant appeals from denial of his motion to correct illegal sentence. In essence, he contends that the imposition of consecutive sentences of two and four years on counts three and four of the indictment respectively, or a total period of imprisonment of six years, "exceeded the trial court's jurisdiction and was in violation of the Constitutional Amendment barring double jeopardy."

A.
The Commission of a Substantive Narcotic Offense and of a Conspiracy to Commit a Narcotic Offense Are Separate and Distinct Offenses.

"It is apparent from a reading of Section 37, Crim. Code (Section 5440, Rev. Stat.), and has been repeatedly declared in discussions of this Court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." (Citations.)

United States v. Rabinowich, 238 U. S. 78, 85.

"It has long been recognized by the Federal Courts, that the commission of the substantive offense and

the conspiracy to commit such are separate and distinct offenses."

Toliver v. United States (C. C. A. 9th), 224 F. 2d 742, 744 (3).

Accord:

Pereira v. United States, 347 U. S. 1;

Pinkerton v. United States, 328 U. S. 640;

United States v. Rabinowich, supra;

Blumenthal v. United States (C. C. A. 9th), 158 F. 2d 883.

In count three of the instant Black case, appellant was convicted of a substantive offense, *i.e.,* the sale of a narcotic drug. He was also convicted of a narcotic conspiracy in count four. Counts three and four are separate and distinct offenses.

B.

Conviction for the Substantive or Objective Offense Does Not Bar Conviction for the Conspiracy to Commit the Substantive Offense.

The trial court cites *Kramer v. United States* (C. C. A. 9th), 147 F. 2d 202, in its Memorandum Opinion. Appellant, acting *in propria persona,* misconstrues the holding in the *Kramer* case and erroneously apparently believes that because the court in the *Kramer* case chose to impose concurrent sentences that the *Kramer* case is authority requiring concurrent rather than consecutive sentences.

Of course, Federal Courts have full power to impose cumulative or consecutive sentences. *United States v. Remus,* 12 F. 2d 239, certiorari denied, 271 U. S. 689.

C.

It Is Not Double Jeopardy to Convict for the Substantive Offense and for the Conspiracy Although the Overt Act of the Conspiracy Is Also the Basis for the Substantive Count.

The same evidence may prove both offenses but this does not make the substantive and conspiracy offenses identical. It is the unlawful agreement and not the overt act which is punished in the conspiracy. That the overt act is also a substantive offense, a sale of heroin, does not result in double punishment.

Toliver v. United States, supra, p. 744 (5).

The plea of double jeopardy is no defense to a conviction for both substantive and conspiracy offenses.

Pinkerton v. United States, supra, pp. 643 and 644.

D.

The Test of Double Jeopardy Is Whether or Not Each of the Two Offenses Requires Proof of a Fact Which the Other Does Not Require.

Where two offenses are charged having relation to the same matter or transaction there is no double jeopardy if each offense requires proof of a fact which the other does not require.

Matthews v. Swope (C. C. A. 9th), 111 F. 2d 697, 699.

The unlawful sale of heroin charged in count three, requires proof that appellant knowingly sold a narcotic drug (21 U. S. C. 174).

A conspiracy, as proscribed by 18 U. S. C. 371, requires that two or more persons conspire or agree to commit an offense against the United States and do any

act to effect the object of the conspiracy. No sale of heroin need be proved but more than one culpable person must be involved to constitute an unlawful agreement or conspiracy.

Count three required proof of a sale; count four required proof of an agreement between two or more persons. The offenses alleged in counts three and four each required proof of a fact which the other did not require and there was no double jeopardy involved.

E.
The Continuing Offense and Lesser Included Offense Theories Are Inapplicable.

Appellant discusses at great length cases concerning subsequent prosecution of lesser included offenses such as bigamy included within unlawful co-habitation and the "continuous or continuing offense" holding in *United States v. Universal Corp.,* 344 U. S. 218, 222. The *Universal* case holds that a single course of conduct does not constitute more than one substantive offense under Section 15 of the Fair Labor Standards Act. The Court considered and determined that thirty-two alleged substantive counts are in fact one continuing substantive offense and that this construction of the Act most properly effectuates the intention of Congress when it passed the Fair Labor Standards Act. Whether or not a conspiracy count under Section 371 of Title 18, United States Code, would have been appropriate was not considered by nor before the court in the *Universal* case. It therefore is not authority contrary to the position of appellee.

Even if appellant had been convicted of thirty-two substantive narcotic counts appellant would fare no better under the *Universal* decision. This court recently rejected the so-called "single transaction" rule with respect

to narcotic violations in *Harry Morris Sherman v. United States of America* (C. C. A. 9th), 241 F. 2d 329, 334, which holds that each sale is a separate violation. The other cases cited by appellant do not hold it improper to prosecute a substantive violation in one count and an unlawful conspiracy in another count even though but one sale is involved.

CONCLUSION.

It is respectfully submitted that a sale and a conspiracy are separate offenses, that conviction for one does not bar conviction for the other and is not double jeopardy.

Respectfully submitted,

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